Markcon Sdn Bhd (In Liquidation) v Resilient Construction Sdn Bhd (Labtec Sdn Bhd & Anor; opposing creditors)

HIGH COURT (JOHOR BAHRU) — COMPANIES WINDING-UP PETITION NO 28-5 OF 1990
JAMES FOONG J
17 JULY 1993

Civil Procedure *— Costs — Winding-up of company — Liquidator did not sue of defend in his own name — Whether liquidator was personally liable for costs*

Companies and Corporations *— Winding-up — Liquidator — Liquidator did not sue of defend in his own name — Whether liquidator was personally liable for costs of proceedings*

The petitioner applied to wind up the respondent company. At the material time, the petitioner itself was in liquidation and therefore, its actions were carried out by the liquidator. The trial judge ordered that the petition be dismissed and for costs to be paid by the liquidator of the petitioner. Two opposing creditors of the respondent company applied for an order that the costs awarded in the judgment order be costs due and paid by the liquidator personally.

Held, dismissing the application:

(1) When a liquidator does not sue or defend in his own name but that of a company, any costs awarded should be that of the company. However, the court is given a discretion, by way of awarding costs personally against the liquidator or persons of such likes, as a sanction for instituting unnecessary proceedings or incurring unnecessary litigious expenses. This sanction should equally apply to cases where there is misconduct or fault or error on the part of the liquidator in bringing such proceedings.

(2) The liquidator did not sue or defend in his own name but that of the company and, as there was no evidence that the liquidator had brought the action unnecessarily or had incurred unnecessary litigious expenses, the liquidator was not personally liable for costs.

[Bahasa Malaysia summary

Pempetisyen telah memohon untuk menggulungkan syarikat responden. Pada masa yang penting, pempetisyen sendirinya berada dalam penyelesaian dan oleh yang demikian, tindakannya telah dilaksanakan oleh penyelesai. Hakim perbicaraan telah memerintahkan supaya petisyen itu ditolak dan kos dibiayai oleh penyelesai pempetisyen. Dua pemiutang syarikat responden yang menentang telah memohon untuk mendapat suatu perintah bahawa kos yang diawardkan di dalam penghakiman itu adalah kos yang kena dan sepatutnya dibayar oleh penyelesai sendiri.

Diputuskan, menolak permohonan itu:

(1) Apabila seseorang penyelesai tidak mendakwa atau membela dalam namanya sendiri tetapi dalam nama syarikat itu, apa-apa kos yang diawardkan ialah kos syarikat. Bagaimanapun, mahkamah diberikan budi bicara untuk mengawardkan kos secara peribadi terhadap penyelesai ataupun orang sepertinya, sebagai suatu sanksi kerana memulakan tindakan secara sia-sia atau menanggung kos litigasi yang sia-sia. Sanksi ini patut juga digunakan dalam kes di mana terdapat salah laku, kesalahan atau kesilapan oleh penyelesai apabila membawa tindakan tersebut.

(2) Penyelesai tidak mendakwa atau membela dalam namanya sendiri tetapi dalam nama syarikat, dan oleh kerana tidak terdapat sebarang keterangan bahawa penyelesai telah membawa tindakan itu secara sia-sia atau menyebabkan perbelanjaan litigasi yang sia-sia, maka penyelesai itu tidak patut menanggung kos tersebut secara peribadi.]

[*Editorial Note*: The opposing creditors have appealed to the Supreme Court vide Civil Appeal No 02–573–1990.]

Notes

For cases on the liquidator's personal liability for costs of proceedings, see 2 *Mallal's Digest* (4th Ed) para 769; 3 *Mallal's Digest* (4th Ed) paras 268–269.

For cases on the liquidator's right to sue in its own name, see 3 *Mallal's Digest* (4th Ed) paras 272 and 302.

Cases referred to

1 *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233 (refd)

2 *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274 (refd)

KL Wong (*KL & Co*) for the opposing creditors.

Ong Ban Chai (*Ong Ban Chai & Co*) for the liquidator.

James Foong J: This is an application (encl 46) by two opposing creditors for an order that costs awarded in a judgment order dated 10 December 1990 be costs due and paid by the liquidator personally. The costs as taxed by the registrar amounts to RM10,222.50 inclusive of the allocature fee of RM764. This matter arose from a petition brought by the petitioner to wind up the respondent. At that material time, the petitioners themselves were in liquidation and therefore their actions were carried out by the liquidator. On 10 December 1990, LC Vohrah J dismissed the winding-up petition of the petitioner and awarded costs in the manner as contained in the judgment order:

> It is ordered that the winding-up petition presented by the liquidator of the petitioner on 25 February 1990 herein be dismissed with costs to be paid by the liquidator of the petitioner to the respondent and the opposing creditors.

Counsel for the liquidator of the petitioner now argued that the liquidator should be personally liable to costs as he acted as an officer of the court in the capacity of liquidator for the petitioner when the winding-up petition was brought. To support his contention, counsel for the liquidator quoted a passage in 1 *Buckley on the Companies Acts* (4th Ed) at p 600 that:

> .... when the liquidator does not sue or defend in his own name but in that of the company, there is no jurisdiction to order the liquidator who is not a party litigant to pay costs, any more than directors of a going company could be ordered to pay costs.

Further, I am informed by the liquidator's counsel that the petitioner is in no position to pay anyone any costs due to a lack of funds.

Counsel for the opposing petitioners who are now claiming for costs from the liquidator personally, submitted to me a number of authorities, two of which I find are of some assistance to the issue in this case.

The first is the Supreme Court decision in *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd*[1] where Gunn Chit Tuan J (as he then was) ruled that the High Court has a discretionary power to grant costs. To this he states as follows [at p 242]:

> We would agree therefore that *Bacal Contracting Ltd v Modern Engineering (Bristol) Ltd & Ors* [1980] 2 All ER 655 is the modern illustration of the general principle that courts could use the sanction of an adverse order in costs against a receiver. But our present case was not one in which the appellants, as receivers, had caused unnecessary proceedings or litigious expenses.

Though the aforesaid case involves a receiver and not a liquidator, I find that the principles enunciated therein can similarly be applied to a liquidator.

An English authority more directly on point which relates to whether a liquidator is liable to costs personally is *Re Wilson Lovatt & Sons Ltd.*[2] Oliver J after examining a whole series of authorities then existing, ruled that the liquidator was personally liable to pay the costs. In *Re Wilson Lovatt & Sons Ltd*,[2] the liquidator, acting as liquidator for a company in liquidation, brought an action against its former directors and a bank on charges of fraud. Part of the claim was abandoned midway through the hearing while the remainder was finally dismissed. Oliver J had this to say when awarding costs against the liquidator personally [at p 286]:

> It seems to me to be quite wrong now that he should then turn round and say: 'I have agreed to pay the costs on a common fund basis but I only agreed to pay them out of assets which I have not got'. That seems to me to be a total negation of justice even were I convinced, which I am certainly not, that the rule is as counsel for the liquidator suggests that it is.

After careful perusal of the authorities cited, I am of the opinion that the law as it now stands is that when a liquidator does not sue or defend in his own name but that of a company, any costs awarded should be that of the company. However, as Gunn Chit Tuan J (as he then was) had expressed in *Zainal Abidin Putih*'s case,[1] the court is given a discretion, by way of awarding costs personally against the liquidator or persons of such likes, as a sanction for instituting unnecessary proceedings or incurring unnecessary litigious expenses. To my mind, this sanction should equally apply to cases

where there is misconduct or fault or error on the part of the liquidator in bringing such proceedings.

Now, let us examine the judgment order dated 10 December 1990. The expression used therein is, 'paid by the liquidator of the petitioner'. Does this mean that the learned judge desired to sanction the liquidator personally? It is rather unfortunate that this application was not heard by LC Vohrah J, the trial judge who dismissed the petition. To my mind, the trial judge who heard the petition would be in a better position to determine whether the petition was brought unnecessarily or had caused unnecessary litigious expenses. If so, the liquidator would personally have to bear the costs. However, I have the opportunity to read the written judgment of LC Vohrah J which is attached as an exhibit in an affidavit filed in support of this application. From it, I do not find any statement or expression from the learned judge that stressed on the fact that such a petition was unnecessary or had caused unnecessary expenses nor, had the learned judge in any way viewed the liquidator's action as a misconduct or fault or error in bringing the petition for whose action should be sanctioned. In fact, in the said written judgment itself, relating to the question of costs, the learned judge has only this to say: 'For the above reasons, I dismissed the petition with costs'. It was only when the order was extracted that it contained the words, 'be dismissed with costs to be paid by the liquidator of the petitioner ...'.

From the aforesaid, I am unable to find, without further evidence, that the liquidator had brought the petition unnecessarily or had incurred unnecessary litigious expenses or whose action needed to be sanctioned. It is therefore not justifiable to rule that the judgment order for 'costs to be paid by the liquidator of the petitioner' to mean the liquidator is personally liable for such costs. Following the general rule that the liquidator does not sue or defend in his own name but that of the company, the costs in this case should be that of the company. As I have stated aforesaid, this general principle is subject to the exceptions aforesaid but in the absence of evidence to the contrary, I have to dismiss this opposing creditors' application.

For this application, I shall not award costs to any party.

Application dismissed.

Reported by Lim Chee Wee